# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 10, 2006 |
| v | No. 259838<br>Jackson Circuit Court |
| TIMOTHY KEITH HORTON,<br><br>Defendant-Appellant. | LC No. 04-000790-FH |

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his bench-trial convictions of child sexually abusive material or activity, MCL 750.145c(2), and second-degree criminal sexual conduct (CSC II) (person under 13 years), MCL 750.520c(1)(a). Defendant was sentenced to concurrent prison terms of 100 to 240 months for the child sexually abusive material or activity conviction and 100 to 180 months for the CSC II conviction. We affirm, but we remand for completion of a guidelines departure form on the CSC II conviction.

Defendant first argues that the trial court erred in failing to suppress a videotape, which purportedly depicts defendant engaging in sex acts with a prone juvenile, that was seized from the basement where defendant resided. We disagree.

We review a trial court's findings of fact on a motion to suppress for clear error. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). A finding of fact is clearly erroneous if, after review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. However, this court reviews de novo the trial court's ultimate decision on a motion to suppress. *Id.*

Defendant argues that the trial court erred in concluding that he did not have a reasonable expectation of privacy in his living area. However, defendant mischaracterizes the trial court's ruling. The trial court did not conclude that defendant did not have a reasonable expectation of privacy in his living area. Instead, the trial court determined that defendant did not have a reasonable expectation of privacy in his video camera because he left it in a common area. In any event, we conclude that the trial court did not err in failing to suppress the videotape because the owner of home had either actual or apparent authority to consent to the search.

"In order to satisfy the Fourth Amendment of the United States Constitution and article 1, § 11 of the Michigan Constitution, a search must be 'reasonable.'" *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997). Generally, for a search to be reasonable, law enforcement officers must obtain a warrant. *Id*. However, consent is an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). When determining the validity of a consent to search, courts should consider the totality of the circumstances. *Id*. Although the person affected by the search must normally give consent, a third party may consent to the search when he or she has equal right of possession or control of the premises. *Goforth*, *supra* at 311. Even where the consenting third party was without actual authority to consent, the search will still be valid if the police officer reasonably believed that the third party had the authority to consent. *Id*. at 312.[1]

Here, the homeowner had actual authority to consent to the search because she had an equal right of possession and control of the basement. Defendant did not have a formal landlord-tenant relationship with the homeowner, but rather was temporarily living in an open area of the homeowner's basement. Moreover, the homeowner and her family had common access and use of the basement. Hence, the homeowner had actual authority to consent to the search of the basement. Further, although defendant might have had a reasonable expectation of privacy in that portion of the basement he utilized as a living space, the officer who seized the videotape testified that the video camera with the videotape in it was on the floor next to the couch within the common area utilized by the homeowner and her family. Because defendant placed the recorder and videotape in a common area where any household member could have viewed the videotape, he had no reasonable expectation of privacy in it. See *United States v Falcon*, 766 F2d 1469, 1476 (CA 10, 1985) (determining that a defendant has no objectively reasonable expectation of privacy in a tape left where another person may readily access its contents). Consequently, the homeowner had the actual authority to consent to a search of the recorder and videotape.

Defendant contends that, even if the homeowner could consent to the search of the basement, the officer was required to get a search warrant before viewing the videotape in defendant's video camera. In support of this contention, defendant relies on *Walter v United States*, 447 US 649; 100 S Ct 2395; 65 L Ed 2d 410 (1980). However, we find *Walter* to be inapplicable to the facts of this case.

In *Walter*, the Federal Bureau of Investigation conducted a warrantless screening of obscene films, which had been turned over to the FBI by a third party to whom the films were mistakenly shipped. The United States Supreme Court concluded that the FBI's screening of the films was an unreasonable search because none of the exceptions to the warrant requirement existed. *Id*. at 654. However, subsequent cases have distinguished *Walter* where, as here, consent to search was given by a third party. See, e.g., *United States v Marshall*, 348 F3d 281, 289 (CA 1, 2003) (holding that a third party with regular access to videos owned by another has

[1] We note that defendant was not present to object to the search. Therefore, the search was not conducted over his express refusal to consent. See *Georgia v Randolph*, 547 US ___; 126 S Ct 1515, 1526; 164 L Ed 2d 208 (2006).

apparent authority to consent to their search); *Falcon, supra* at 1476; *United States v Shields*, 675 F2d 1152, 1159 (CA 11, 1982) (holding that a third party who has a sufficient interest in a tape may consent to its search). Thus, we conclude that *Walter* is inapposite because, unlike the mistaken recipient of the films in *Walter*, the homeowner in this case had actual or at least apparent authority to consent to a search involving the viewing of the videotape.

Next, defendant argues that there was insufficient evidence to support his convictions. More specifically, defendant contends that the prosecution failed to produce sufficient evidence that the figure in the videotape was an actual child rather than a doll. We disagree.

This Court reviews a claim of insufficient evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, we will not interfere in the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Id*. at 561.

Although the trial court admitted that at times it was unclear in the videotape whether the figure was a doll, the trial court noted that the figure in the videotape was very anatomically correct—the trial court could see ankle bones and an indentation where her buttocks and legs met. There was also testimony that defendant's daughter had an overnight visit with defendant during the relevant time frame and her mother identified her as the child in the videotape based on her tan line, scar, and birthmark. The trial court further noted that defendant's movements around the figure in the videotape were gingerly—as if defendant did not want to wake her—which would be unusual if this was a doll and not a child. Finally, the state supervisor for an adult novelties business rebutted defendant's testimony that it was a doll in the videotape, noting that the figure in the videotape did not resemble any doll he had ever seen and that dolls within the price range described by defendant were not anatomically correct. When viewed in the light most favorable to the prosecution, we conclude that there was sufficient evidence for the trial court to conclude that the figure in the video was a child.

Defendant next challenges the trial court's scoring of Offense Variable (OV) 10 at 15 points. We review sentencing issues for an abuse of discretion by the trial court. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 660; 620 NW2d 19 (2000). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *Id.*

OV 10 scores points for conduct involving the exploitation of a vulnerable victim. MCL 777.40(1). Where the defendant's conduct was predatory, OV 10 is scored at 15 points; however, if the conduct was not predatory, but where the defendant exploited the victim's youth, a domestic relationship, or a sleeping victim, OV 10 should be scored at 10 points. In the present case, there is clearly evidence to support the scoring of OV 10 at 10 points. Therefore, even if we were to conclude that the trial court erroneously scored OV 10 at 15 points rather than 10 points, the correction would not alter the applicable guidelines ranges. See MCL 777.63 and MCL 777.64. Consequently, there is no need to remand for resentencing. *People v Francisco*, 474 Mich 82, 89-90 n 8; 711 NW2d 44 (2006).

Defendant next argues that the trial court erred in departing from the sentencing guidelines. We disagree.

In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factor constituted substantial and compelling reason for departure and the amount of the departure are reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

Under the sentencing guidelines, MCL 769.31, *et seq*., a trial court must impose a sentence within the guidelines range unless there is a "substantial and compelling" reason for departure and the court states that reason on the record. MCL 769.34(3); *Babcock*, *supra* at 255-256. To determine whether a reason is "substantial and compelling" the Court must look to the following factors: (1) the reason must be objective and verifiable; (2) the reason should keenly or irresistibly grab the attention of the reviewing court; (3) the reason must be of considerable worth in deciding the length of a sentence; and (4) the reason must be something that exists only in exceptional cases. *Babcock*, *supra* at 257-258, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). Further, if a trial court finds that there are substantial and compelling reasons to believe that sentencing the defendant within the guidelines range is not proportionate to the seriousness of the defendant's conduct and criminal history, then the trial court should depart from the guidelines. *Id*. at 264. But any departure by the trial court must be proportionate to both the seriousness of the defendant's conduct and the defendant's criminal record. *Id*. The sentence imposed must be within the range of principled outcomes, or it will be found to be an abuse of the trial court's discretion. *Id*. at 269. Finally, a departure cannot be based on "an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b).

At the sentencing hearing, the trial court noted several reasons that it felt warranted an upward departure from the recommended sentences. First, the court noted that the sentencing guidelines did not account for the serious nature of the underlying conduct. Specifically, the trial court stated that the guidelines did not consider the simulated oral and vaginal sex acts and did not take into account that defendant ejaculated on the victim. Second, the court determined that the guidelines did not take into account the deviant behavior that led to the investigation and which indicated that defendant had a serious problem controlling his sexual desires. Third, the trial court stated that the guidelines did not adequately take into consideration the potential psychological harm to the victim. For these reasons, the trial court determined that a more severe punishment was warranted.

We conclude that the trial court's first and second reasons satisfy the four-prong *Babcock* test. First, both reasons are objective and verifiable. "Objective and verifiable factors are those that are external to the minds of the judge, defendant and others involved in making the decision and are capable of being confirmed." *Abramski*, *supra* at 74. Here, the fact that defendant has a serious problem controlling his sexual desires and that he performed simulated sex acts and ejaculated on his daughter are objective and verifiable. Second, this repugnant conduct keenly and irresistibly grabs one's attention. Third, these factors are of considerable worth in deciding

the length of a sentence because they demonstrate the severity of defendant's inability to control his sexual desires. Lastly, defendant's behavior is something that exists only in an exceptional case. Therefore, the trial court did not abuse its discretion when it determined that an upward departure was warranted.[2] Furthermore, although the departures were significant, based on the severity of the described conduct, we cannot conclude that the ultimate sentences were disproportionate to the crimes.

Defendant also argues that, because the trial court erred in not filling out a departure evaluation form for the CSC II conviction, he should be resentenced within the guidelines range. We agree that the trial court should have filled out a departure evaluation for the CSC II conviction, but disagree with defendant's contention that resentencing is warranted. Such a defect does not require resentencing, but merely remand to the trial court to complete that ministerial task. See *People v Armstrong*, 247 Mich App 423, 426; 636 NW2d 785 (2001).

Next, defendant argues that his sentence violates the rule of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has held that, because Michigan's sentencing system is indeterminate, it is unaffected by the holding stated in *Blakely*. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). Therefore, defendant's argument is without merit.

Finally, we reject defendant's argument that his trial counsel was ineffective. The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. The factual findings are reviewed for clear error, and the matters of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second part of the test, defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id*. at 6. Further, a reviewing court will not assess trial counsel's competence with the benefit of hindsight, *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999), rather "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Defendant argues that he was denied his right to the effective assistance of counsel in the following ways: (1) by trial counsel's failure to raise the improper search and seizure at his

[2] We decline to address whether the remaining reason stated by the trial court was proper. Even assuming that the third reason articulated by the trial court does not meet the *Babcock* test, defendant is not entitled to resentencing because the trial court specifically stated that "[i]f any of these reasons are found to be substantial and compelling, I would order this sentence." Hence, it is clear that the trial court would depart to the same extent. See *People v Havens*, 268 Mich App 15, 17-18; 706 NW2d 210 (2005).

preliminary examination; (2) by trial counsel's failure to object at sentencing to the trial court's improper scoring of defendant's guidelines and its improper departure; (3) by trial counsel's failure to raise *Blakely* at sentencing; and (4) by trial counsel's failure to raise any of defendant's positive factors at sentencing. We disagree with each argument.

Defendant's trial counsel was not ineffective for failing to challenge the search and seizure of the videotape at the preliminary examination. Trial counsel did move, both before and at trial, for the suppression of the videotape, and defendant has failed to explain how bringing the matter to the district court's attention at the preliminary examination would have resulted in a more favorable outcome.

Next, as to trial counsel's performance at sentencing, we do not believe that counsel was ineffective. First, trial counsel did object to the scoring of OV 10. Therefore, defendant's claim to the contrary is erroneous. Likewise, although defendant's trial counsel did not object to the trial court's departure and did not raise *Blakely* at sentencing, defendant cannot show any resulting prejudice because there is no preservation requirement when a trial court departs at sentencing, *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), and *Blakely* is inapplicable to Michigan's sentencing system. *Drohan, supra*. Finally, defendant's trial counsel did request that defendant be sentenced within the guidelines, and this Court has held that trial counsel is not ineffective for failing to exercise the right to allocution. *People v Arney*, 138 Mich App 764, 766; 360 NW2d 291 (1984). So trial counsel's failure to raise any of defendant's positive factors at sentencing does not render her assistance ineffective.

There were no errors warranting reversal or resentencing. Therefore, defendant's convictions and sentences are affirmed. However, we remand this case to the trial court for completion of a guidelines departure form for the CSC II conviction. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot